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No. 135

In the Supreme Court of the United States

OCTOBER TERM, 1958

BILLY G. WOODY, PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The order of the Court of Appeals (R. 49–50) is reported at 258 F. 2d 535.

JURISDICTION

The judgment of the Court of Appeals was entered on October 10, 1957 (R. 49). The petition for a writ of certiorari was filed on October 23, 1957, and was granted on June 30, 1958 (R. 51). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the two counts of the indictment can be deemed to involve only one act or transaction, and whether the transcript of the trial, which is now avail-

able, should be considered in resolving that issue in this proceeding under 28 U. S. C. 2255.

2. Whether, in the circumstances of this case, petitioner could validly be given cumulative sentences under the National Motor Vehicle Theft Act for both "transporting" a stolen automobile in interstate commerce and for separately "receiving and concealing" it.

STATUTES INVOLVED

18 U. S. C. 2312 (Section 3 of the National Motor Vehicle Theft Act, 41 Stat. 324, 325, as amended) provides:

> *Transportation of stolen vehicles.*
>
> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U. S. C. 2313 (Section 4 of the National Motor Vehicle Theft Act, 41 Stat. 325, as amended) provides:

> *Sale or receipt of stolen vehicles.*
>
> Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

1. In the United States District Court for the Western District of Tennessee, on June 24, 1954,

petitioner was found guilty by a jury of two violations of the National Motor Vehicle Theft Act under an indictment in two counts (R. 19). Count one charged that petitioner, on or about March 16, 1954, transported a stolen Buick automobile in interstate commerce from Sheffield, Alabama, to Savannah, Tennessee, in violation of 18 U. S. C. 2312, Section 3 of the Act (*supra*, p. 2), knowing that the Buick had been stolen (R. 20). Count two charged that on or about the same date in the Western District of Tennessee petitioner received and concealed the same Buick, which was moving in interstate commerce from Sheffield, Alabama, to Savannah, Tennessee, in violation of 18 U. S. C. 2313, Section 4 of the Act (*supra*, p. 2), knowing that the Buick had been stolen (R. 20). Petitioner was given consecutive sentences of 5 years on each count, for a total of 10 years' imprisonment, and was fined $250 (R. 19).

The present proceedings arose on July 12, 1957, when petitioner applied for leave to proceed in forma pauperis in the District Court on a motion to vacate sentence under the provisions of 28 U. S. C. 2255 (R. 19–29). Petitioner alleged in effect that he had been wrongfully charged with two offenses, and that his conduct in transporting and concealing the stolen automobile constituted but one act and one offense, punishable by a total maximum of 5 years' imprisonment (R. 20, 21). On August 5, 1957, the District Court denied leave to proceed in forma pauperis. It adverted to the fact that petitioner had filed several previous petitions under Section 2255 and ruled that

petitioner's contentions should have been raised at the trial, stating that it was familiar with the facts (R. 29–30). Subsequent to the filing of petitioner's notice of appeal from this ruling (R. 30–31), the District Court on September 5, 1957, entered an order denying the motion for leave to appeal in forma pauperis, and certified that the appeal was "without merit and not taken in good faith" (R. 32, 33).

On September 14, 1957, petitioner filed in the United States Court of Appeals for the Sixth Circuit an application for leave to appeal in forma pauperis (R. 34–36), and, four days later, a motion to remand the proceedings to the District Court for findings of fact and conclusions of law under his motion to vacate sentence (R. 38–47). On October 10, 1957, the Court of Appeals denied both the motion for leave to proceed in forma pauperis and the motion to remand. It stated in its order that the law had long been settled in the Sixth Circuit and "in every federal court where the precise question has arisen" that petitioner could be separately punished under both sections of the Motor Vehicle Theft Act.[1] It also denied the motion to remand for the reason that the facts relied upon were not in dispute (R. 49–50).

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[1] In a prior proceeding under 28 U. S. C. 2255, petitioner had presented, *inter alia*, the same question for review and the Court of Appeals had denied leave to appeal in forma pauperis. See No. 227 Misc., Oct. Term 1955, certiorari denied, 350 U. S. 939.

2. The pertinent evidence adduced at the original trial[2] showed that the Roadmaster Buick with Texas license plates (Motor No. 68791157, R. 124) was stolen on March 2, 1954, at Texarkana, Arkansas (R. 58–60, 53). It was recovered on April 8, 1954, when petitioner was arrested in Savannah, Tennessee (R. 109–110, 112).

The books of the Tax Assessor's Office and Probate Court of Colbert County, Alabama, show that on March 3, 1954, a Billy Woody applied for Alabama plates on a 1954 Roadmaster Buick, allegedly purchased in Tennessee (R. 63–77). When the car was recovered, it was discovered that the public motor number of the Buick had been changed to 68791050 (R. 118–119, 121, 124). After petitioner's arrest, the police found in the car a receipt for his Alabama license tags and a notarized bill of sale for the Buick which bore the incorrect, altered, motor number, 68791050 (R. 109–111, 130–131). On March 16, 1954, in Alabama, petitioner and another man came before a notary and the other man,

[2] After the grant of certiorari in this case, petitioner moved *pro se* for a transcript of the evidence at his trial in support of his contentions. (The trial testimony had not been transcribed.) The government suggested that the motion be denied with leave to renew after counsel was appointed, since it might be possible to reach a stipulation as to the facts; the Court then denied the motion without prejudice. When counsel was appointed, he renewed the request for a transcript, and a copy was furnished to him at government expense. Thereafter, he chose not to designate it for printing, but the government did so. It has been printed in the record before this Court. See the discussion of this procedure in the Argument, *infra*, pp. 13–15, 18–20.

who called himself Harold Hobart, had his signature notarized on the bill of sale (R. 113–114).[4]

Several changes in the physical appearance of the Buick were made during the interval between its theft and its recovery. Prior to the theft, the body of the car had been painted yellow and the top was painted black (R. 53, 59). About April 1, in Savannah, Tennessee, petitioner and another painted the car so that it was all black. They had a blanket or tarpaulin hanging on the fence near the place where the painting was being done (R. 93, 94, 97–98, 101, 102, 105, 107). Petitioner hired an experienced automobile painter to finish the paint job (R. 98, 100, 105). Before the theft, the right rear fender was bent (R. 55, 59, 60), and petitioner later repaired this with the assistance of the automobile painter (R. 99, 100). Originally, there was no large tank in the trunk compartment (R. 57), but, when the stolen car was recovered, it had a second gas tank of approximately 12-gallon capacity concealed above the regular tank. There was a copper connection from this reserve tank to the fuel pump, and when a connecting hose was attached to another automobile from which gasoline could be stolen, the fuel pump of the Buick would pump the gasoline from the other automobile into the reserve tank in the trunk compartment of the Buick (R. 126–128, 133–134).

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[4] The books of the Alabama Probate Court carried the motor number 68799957 whereas the original receipt (as discovered in the car after its recovery) had Motor No. 68791050. The books also gave the date as March 3, whereas the original had the date of March 16 (R. 77). The car was seen in Savannah, Tennessee, about March 4, with Alabama license plates (R. 89–90).

In his charge to the jury, the trial judge pointed out that it was the government's contention that petitioner did "receive or conceal, through the changing of license numbers and painting of the car, among other things," the automobile alleged to have been stolen (R. 140). He noted that the illegal transporting of a stolen automobile and the receiving and concealing it were "separate offenses" under "separate counts" (R. 136, 139–140), and charged, "You will consider the two counts in the indictment separately and designate in your verdict on which count or counts [petitioner] is found guilty beyond a reasonable doubt, and on which count or counts he is found not guilty" (R 143).

SUMMARY OF ARGUMENT

In denying leave to proceed in forma pauperis, the courts below apparently held, in accord with numerous lower court decisions, that even if (as petitioner alleged) the receipt and concealment of the stolen automobile occurred as an inseparable part of the interstate transportation of the vehicle, the two counts of the indictment—charging (1) transportation and (2) receipt and concealment—stated two separate offenses for which separate punishment could validly be imposed. However, the trial transcript, which was obtained after this Court granted the petition for a writ of certiorari and leave to proceed in forma pauperis, negates petitioner's allegation that those were the facts in his case. It makes explicit not only, as the government had argued abstractly in its brief in opposition, that acts of concealment can be separate from the transportation, but that in this case acts of conceal-

ment separate from the interstate transportation were affirmatively proved, and that the case was submitted to the jury on the theory that the acts of concealment charged were in addition to the transportation. Whether the trial record is considered by this Court or not, this case cannot be decided as if it involved only one act or transaction of transportation. And since separate acts involving separate impulses were charged and proved, separate sentences were properly imposed.

I

A. The decisions of this Court seem to hold that if, on collateral attack (including proceedings under 28 U. S. C. 2255), there is no dispute as to what occurred at the trial and no necessity to resolve factual issues which should have been submitted to the jury, a court may consider the record, including the transcript, to determine whether multiple consecutive sentences related to one transaction or to multiple transactions. The government has never questioned that, where it appears from the face of the indictment and the judgment that a sentence illegally imposes double punishment for the same offense, the error is one which may be corrected on collateral attack. That has been established as far back as *In re Snow*, 120 U. S. 274, at a time when there was no direct review in criminal cases and review came only by way of a petition for a writ of habeas corpus and subsequent appeal to this Court. This Court has also held that, where the indictment suggests the possibility that offenses for which consecutive sentences were imposed related to one transaction and an allegation to that effect is conceded to be

true, the undisputed facts may be accepted for the purpose of collateral attack. *Morgan* v. *Devine,* 237 U. S. 632. In the situation where a defendant collaterally attacking a judgment as imposing double punishment makes allegations of fact to which the government does not accede, but which the record affirmatively proves or disproves, *Ex parte Nielsen,* 131 U. S. 176, 183, seems to us to be authority for the proposition that the Court may consider the record of the trial as bearing upon the legality of the sentence. In the days when habeas corpus was the method of obtaining appellate review, it seems to have been fairly common practice to attach a record of the trial to habeas corpus proceedings, and the Court accepted the undisputed record as proof of facts which went to a jurisdictional issue cognizable on habeas corpus.

The cloudy situation, which the government discussed in *Ladner* v. *United States,* No. 2, this Term, is that presented either when there is no record of the trial (as in *Ladner*) or the record is silent (or conflicting) with respect to the facts which are alleged to show that the sentence was beyond the power of the court to impose. That situation is not present here. In this case, the facts relating to the claim of illegal sentences appear of record, and there is no reason why the Court should not consider them.

B. The transcript reveals clearly that at the trial there was proof of independent acts of concealment, including a false application for license plates in Alabama and alteration of the motor number, distinct from the transportation of the stolen vehicle, occurring both before and after the interstate transporta-

tion charged in the indictment. Moreover, the trial court submitted the case to the jury on the basis that the government had charged separate acts of receiving and concealing "through the changing of license plates, and painting of the car, among other things." The trial record thus refutes the premise of petitioner's argument that only one act or transaction was involved.

C. If the trial record is not deemed properly before the Court at this time, the case must nevertheless be decided on the basis that the acts of concealment and of transportation were separate. There is nothing on the face of the indictment, except that the events are alleged to have occurred on or about the same date, to indicate that the acts of concealment were an inseparable part of *one* transaction. It was necessary for petitioner, in collaterally attacking the judgment, to present the factual foundation for his attack. This he has not done. It will therefore have to be presumed that the indictment covered separate acts.

II

A. Since the concealment of the stolen automobile in this case involved separate acts motivated by separate criminal impulses, which were distinct from the transportation, there is no reason why petitioner should not be separately punished for such separate acts of wrongdoing. The rule of lenity, announced by this Court in *Bell* v. *United States*, 349 U. S. 81, 83–84, is a rule "against turning a single transaction into multiple offenses" where the Congressional intent is not clear. Nothing in that decision casts the slight-

est doubt on the proposition that, if the defendant there had separately transported two different women at two different times, he would have committed two different offenses under the same statute. The importance of the singleness of the criminal impulse is highlighted by the decision of this Court in *Ladner* v. *United States,* No. 2, this Term, decided December 15, 1958, where the Court sent the case back for a hearing as to whether the wounding of two federal officers in resisting arrest was the result of one shot or more, holding that the firing of one shot could constitute only one offense under the statute. Thus, the problem of statutory construction was regarded as involving different considerations if the case showed one criminal impulse or more than one.

We think this principle largely disposes of the problem of this case. If two acts of the same character are separate offenses under the same statute when they result from separate criminal impulses at different times, there is no reason why separate acts of different character, occurring at different times, should not be separate offenses under two different sections of a statute.

B. Neither the language or the legislative history of the Dyer Act indicates that Congress intended the transporter of a stolen vehicle not to be subject to additional separate punishment for additional separate acts of concealment. The two sections, 18 U. S. C. 2312 and 2313 (formerly Sections 3 and 4 of the National Motor Vehicle Theft Act), concededly

create separate offenses. Section 2312 punishes anyone who transports in interstate commerce a stolen vehicle, knowing it to have been stolen; Section 2313 punishes anyone who "receives, conceals, stores, barters, sells, or disposes of" a stolen vehicle moving as part of interstate commerce, knowing it to have been stolen. Of the various acts specified by Section 2313, only receipt would always necessarily be involved in the transportation. All the other acts could occur before, during, or after a particular interstate transportation, and would normally involve additional affirmative acts of criminality. As this case illustrates, concealment can involve such affirmative separate acts of wrongdoing as changing motor numbers, executing false bills of sales, painting, and making major repairs. These affirmative additional acts are properly subject to punishment cumulative to the sanction fixed for the transportation.

The legislative history suggests that, while Congress undoubtedly intended to reach confederates of the transporter by Section 2313, it also intended to subject the transporter himself to extra punishment if, in addition to the transportation, he performed the separate acts which Section 2313 proscribes.

Numerous decisions of courts of appeals have held, on collateral attack, that, even on the assumption that the acts of concealment occurred as a very part of the transportation, Section 2313 proscribes acts which must necessarily be in addition to the bare interstate transportation forbidden by Section 2312, and therefore that such additional acts are properly subject to separate punishment. There is certainly no reason

to hold, as it would be necessary to hold to sustain petitioner's position, that acts of concealment which are distinct from and in addition to the transportation are freed from separate punishment when performed by the transporter.

ARGUMENT

INTRODUCTION

The indictment in this case charged that both the act of transportation and the receipt and concealment of the stolen motor vehicle took place on or about March 16, 1954. In his motion to correct sentence, petitioner alleged that both charges stemmed from one act (R. 19–21). At that time, the trial proceedings had not been transcribed. While the trial judge stated that he was familiar with the facts, he did not specify the basis on which he found no merit in petitioner's contentions—whether this was because petitioner's allegations of fact were inaccurate or because his legal theory was erroneous. The Court of Appeals, in denying both the motion for leave to appeal in forma pauperis and the motion to remand, stated that the facts were not in dispute; but, as we read the decision, particularly in the light of the rulings of its own and other circuits which it cites, this represents a holding that, even on the facts as petitioner stated them to be—that the evidence proved only one transaction—petitioner could validly be sentenced under both sections of the Motor Vehicle Theft Act.

When the case came before this Court on the petition for a writ of certiorari, the government first

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pointed out (in its brief in opposition) that the denial of leave to proceed in forma pauperis was reasonable in the light of numerous decisions and of the prior proceeding by this petitioner in which the same issue had been raised and rejected. The government then discussed the merits of the position that petitioner could not be sentenced under both sections; we pointed out that concealment necessarily involved something more than transportation, and expressed the view that this in itself, under the decided cases, rendered the offenses separate "even though steps in a continuing transaction." There was no attempt to distinguish between the different situations that might be presented if the proof at the trial showed one act or transaction, or different acts at different times.[4]

In view of the grant of certiorari in this case, and the permission to proceed in forma pauperis, the government takes the position that the merits are now before the Court, there being no occasion to remand the cause for reconsideration of the denial of leave to appeal since the Court of Appeals had expressed its view of the basic legal issue involved. See *Pollard* v. *United States*, 352 U. S. 354, 359. Accordingly, when it developed that the facts of petitioner's trial were fairly complex and might be difficult to stipulate, and when appointed counsel requested that he be furnished with a copy of the transcript, the record was transcribed and a copy was furnished to counsel at government expense. The government also filed a

[4] The trial record had not then been transcribed.

copy with this Court and designated it for inclusion in the record. See footnote 2, *supra*, p. 5.

The transcript of the trial makes explicit not only, as the government had argued abstractly in its brief in opposition, that acts of concealment can be separate from the transportation, but that in this case acts of concealment separate from the interstate transportation were affirmatively proved, and that the case was submitted to the jury on the theory that the indictment charged acts of concealment in addition to the transportation. It is the government's position that, whether the trial record is considered by the Court or not, this case cannot be decided on the theory that it involved only one act or one transaction. If the record cannot be considered, then the two counts of the indictment, which *could* relate to separate acts, must be taken to have covered separate acts. If the record is properly before the Court, then it makes clear that more than one act was actually involved. In either event, the Court is not called upon in this case to construe the statutes as if there was only one act or transaction, motivated by a single criminal impulse.

However, in view of the recent decision in *Ladner* v. *United States*, No. 2, this Term, decided December 15, 1958 (in which, unlike this case, there was no transcript of record available), we discuss first the extent to which a court may consider a trial record on collateral attack charging illegal consecutive sentences. Then, we discuss the precise issue as to consecutive sentences which, in our view, is properly before the Court in this case, *i. e.*, whether the transporter of a

stolen car may ever be guilty of the crime of receiving and concealing that car while it is moving as interstate commerce.

I. THIS CASE DOES NOT INVOLVE A SINGLE ACT OR TRANSACTION

A. *If there is no dispute as to what occurred at the trial and no necessity to resolve factual issues which should have been submitted to the jury, a court on collateral attack may consider the record, including the trial transcript, to determine whether multiple consecutive sentences involve one act or transaction, or multiple transactions.*

The government does not argue, and did not argue in *Ladner* v. *United States*, No. 2, this Term, that the validity of consecutive sentences on multiple counts can never appropriately be an issue cognizable on collateral attack (under 28 U. S. C. 2255, or otherwise). The question which it discussed in *Ladner* was "the extent to which issues of fact relating to the evidence developed at a trial can be a basis of collateral attack on a judgment" (see the Brief for the United States, No. 2, this Term, p. 25). It confined its discussion to the problems presented by the particular situation in that case where there was no transcript available or possible, and there was a real chance, not only that conflicting testimony (which the jury should have resolved) might have been offered at the trial on the issue of the number of shots, but also that there would even be a conflict at a hearing as to what had occurred at the trial. This is the opposite extreme of an attack on multiple sentences

where the circumstances appear from the face of the indictment. In between the two extremes are varying situations which the government did not discuss in *Ladner*, because they were not there involved, but which are more pertinent here.

1. There is no doubt that where it appears from the face of the indictment and the judgment that a sentence is illegal, either because it is excessive or because it involves double punishment for the same offense, the error is one which may be corrected on collateral attack. That was established as far back as *Ex parte Lange*, 18 Wall. 163, and *In re Snow*, 120 U. S. 274, at a time when there was no direct review in criminal cases, and review could be had only by way of a petition for a writ of habeas corpus and subsequent appeal to this Court. It has been held that where the illegality appears from the face of the indictment such an issue may even be raised by a motion to correct sentence (now under Rule 35) even though this is a motion of very limited scope which is confined to the old common law record, *i. e.*, the indictment, the pleadings, and the proof.[5] See *Holiday* v. *Johnston*, 313 U. S. 342, 349.

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[5] See *United States* v. *Morgan*, 346 U. S. 502, 506, and *United States* v. *Bradford*, 194 F. 2d 197, 201 (C. A. 2), certiorari denied, 343 U. S. 979, as to the nature of the motion under Rule 35. In *Tinder* v. *United States*, 345 U. S. 565, which involved the question of whether the offense was punishable as a misdemeanor rather than a felony, the government itself suggested that the issue, which had been raised by a motion under 28 U. S. C. 2255, was cognizable under Rule 35, even though 28 U. S. C. 2255 did not lie because the defendant had been released from custody (see Brief for the United States, No. 113, Oct. Term, 1952, pp. 4–5, fn. 3).

2. Where the indictment suggests the possibility that the offenses for which consecutive sentences were imposed involved only one transaction and an allegation to that effect is conceded to be true, the Court has also held that the undisputed facts may be accepted for the purpose of collateral attack as if these facts appeared on the fact of the indictment. *Morgan* v. *Devine,* 237 U. S. 632; *Bell* v. *United States,* 349 U. S. 81;* *Prince* v. *United States,* 352 U. S. 322.

3. One step removed (but still different from the situation before the Court in *Ladner*) is that presented where the defendant, collaterally attacking a judgment as imposing double punishment, makes allegations of fact, to which the government does not accede but which the trial record affirmatively proves or disproves. *Ex parte Nielsen,* 131 U. S. 176, 183, seems to us to be authority for the proposition that, in that event, the Court may consider the record of the trial as bearing upon the legality of the sentence. That defendant had pleaded guilty to an indictment, returned in September 1888, charging unlawful cohabitation with a woman not his wife for the period from October 15, 1885, to May 13, 1888. He thereafter was indicted for adultery with the same woman on May 14, 1888. To that second indictment he en-

* In the government's brief in opposition in *Bell* v. *United States* (No. 180 Misc., Oct. Term, 1954), it raised the question whether the claim of one transaction could be asserted where the factual basis of the claim did not appear from the face of the indictment. It did not press that position on the merits, after the grant of certiorori, since the allegation that there was only one transportation in that case was found on inquiry to be true and correct.

tered a plea of previous conviction, contending that the indictment for unlawful cohabitation covered the period up to the finding of the indictment in September 1888, and thus embraced the time within which the adultery was alleged to have been committed. The government demurred to the plea and the demurrer was sustained. After the petitioner was convicted and sentenced on the adultery charge, he attacked the sentence by way of habeas corpus. This Court held that if the fact of double conviction "appears in the indictment, or anywhere else in the record (of which the judgment is only a part), it is sufficient. In the present case it appeared on the record in the plea of *autre fois convict,* which was admitted to be true by the demurrer of the government. We think that this was sufficient" (131 U. S. at p. 183).

At the time *Nielsen* was decided—when, as already noted, direct review was not available in criminal cases—it seems to have been fairly common to attach a record of the trial to habeas corpus proceedings. See, for example, *Ex parte Bain,* 121 U. S. 1, where the Court quoted the exact language used at the trial with respect to its ruling that the indictment had been improperly amended. If the issue raised was considered a jurisdictional one, which could be reached on habeas corpus, the trial record was accepted as proof of the allegations with respect to lack of jurisdiction. Cf. *Harlan* v. *McGourin,* 218 U. S. 442, 447–448, where in declining to examine a bill of exceptions offered in support of the contention that there was no evidence to support a verdict, this Court distinguished cases

where the record was accepted with relation to jurisdictional facts.

Following this authority and practice, it seems to us that, where the trial record is available to show exactly what occurred, the Court may consider the facts which that record establishes. Thus, in *Gore* v. *United States,* 357 U. S. 386, the government did not question the petitioner's right to file with this Court a transcript of the testimony at the trial in support of his allegation that the three offenses there involved arose out of one act of sale. The trial record here refutes, rather than establishes, petitioner's allegations (see *infra,* pp. 23–25), but the principles involved are the same as those laid down in *Nielsen.* So long as the facts clearly appear in the record, there is no reason why the Court should not consider them.

4. For the purposes of this case, it is unnecessary to go beyond this point, but for the sake of completeness we shall also deal with the cloudy situation, discussed by the government in *Ladner,* which is presented either when there is no record or the record is silent (or conflicting) with respect to the facts which are alleged to show that the sentence was beyond the power of the court to impose. We have found no decisions of this Court discussing this problem in the context of an attack on multiple sentences, so that it becomes necessary to look to analogous situations.[7] As appears from the summaries of prior decisions in both the majority and the dissenting

[7] The Court pretermitted the problem in *Ladner* (slip op., pp. 3–4).

opinions in *Sunal* v. *Large,* 332 U. S. 174, 178–181, and 185–187, the decisions of this Court have not been entirely consistent with respect to the power on collateral attack to reconsider issues, even though jurisdictional, which could have been but were not decided, or were wrongly decided at the time of the trial. In the days when habeas corpus was a method of review of issues deemed jurisdictional, the Court laid down the rule that a defendant asserting lack of jurisdiction could present facts which were supplementary to the record, but not contradictory to it. In *In re Cuddy,* 131 U. S. 280, 286, the Court held that where a defendant attacking a judgment of contempt did not allege and did not show that the contempt was not in the presence of the court, it had to be presumed that the evidence made out a case of contempt. The opinion noted, however, that if the defendant had alleged that the misbehaviour was outside the presence of the court "he would have been entitled to the writ, and, upon proving such facts, to have been discharged. Such evidence would not have contradicted the record." But contrast, at a later period, *Craig* v. *Hecht,* 263 U. S. 255, which held that the impropriety of a conviction for contempt was an issue for appeal and not for collateral attack. There is a similar difference in authorities on the question of reviewing, in collateral proceedings, an attack on the constitutionality of a statute. Cf. *Ex parte Siebold,* 100 U. S. 371, with *Glasgow* v. *Moyer,* 225 U. S. 420. We did not in *Ladner* discuss those earlier cases because we considered that this

Court had itself summed up the matter in *Sunal* v. *Large,* 332 U. S. 174, 179:

> * * * Thus where the jurisdiction of the federal court which tried the case is challenged or where the constitutionality of the federal statute under which conviction was had is attacked, habeas corpus is increasingly denied in case an appellate procedure was available for correction of the error. Yet, on the other hand, where the error was flagrant and there was no other remedy available for its correction, relief by *habeas corpus* has sometimes been granted. * * *

The question apparently narrows down to whether the court deems the case to present "exceptional circumstances," which justify reconsideration of jurisdictional issues, even though they could have been reached on appeal. See *Bowen* v. *Johnston,* 306 U. S. 19, 27.

Clearly, if a factual issue has been raised and submitted to the jury, it would be contrary to the whole trend of the decisions of this Court to allow that factual issue to be relitigated on collateral attack. Although couched in terms of jurisdiction to impose sentence, an attack on the judgment in such circumstances would be nothing more than an attack on the sufficiency of the evidence to support the conviction, which has long been recognized as not being an issue cognizable on collateral attack. See *Harlan* v. *McGourin,* 218 U. S. 442; and see *Bowen* v. *Johnston,* 306 U. S. 19, 27, noting that courts should not exercise the power to re-examine jurisdictional issues on collateral attack "where there are

essential questions of fact determinable by the trial court." If the record as to what occurred in this case at the trial were less clear than it is, that rule would in itself preclude petitioner from asserting that there was in this case only one transaction, for as we point out *infra*, pp. 23–25, the jury were instructed that the acts of concealment charged were in addition to the transportation.

The more difficult problem is presented by the situation where the facts relied upon for collateral attack are not clear or were never decided in the trial court, *e. g.*, if there was a plea of guilty, or if the evidence at the trial did not prove, or the jury was not called upon to decide, the question one way or the other. In that event, the court on collateral attack would not be reviewing something decided by the trial court, and to that extent the case could be said to present "exceptional circumstances" under the *Bowen* case. On the other hand, it seemed to us in *Ladner*, and seems to us now, that the whole tenor of the majority opinion in *Sunal* v. *Large*, 332 U. S. 174, is to preclude a defendant, collaterally attacking a judgment, from trying, years later, to prove at a new hearing facts which could have been, but were not, made an issue at the trial. And the situation becomes particularly complicated where, as in *Ladner* itself, no record is available and it becomes necessary to try to reconstruct, by testimony, what happened at the trial.

B. *The trial record shows that the acts of concealment proved at the trial were separate from the transportation charged in the indictment, and that the case*

was submitted to the jury on the theory that the charged acts of concealment went beyond the transportation.

Here, there was a trial and the transcript is now available. As discussed, *supra*, pp. 18 *ff*, we believe that that transcript can properly be taken into account in this proceeding under 28 U. S. C. 2255.

The transcript reveals clearly that at the trial there was proof of affirmative acts of concealment, distinct from the transportation of the stolen vehicle and the incidental receipt and concealment that might be involved in that transportation. Separate acts of concealment had occurred in Alabama, while the car was moving in interstate commerce from Arkansas to Tennessee, before the transportation from Alabama to Tennessee on which the indictment was founded. Whether it occurred on March 3 or March 16 (see *supra*, pp. 5–6), the act of applying for a license under a false motor number on the basis of an alleged purchase which had never occurred was certainly separate and apart from the subsequent transportation. See the Statement, *supra*, pp. 5–6. In addition, there was the act of concealment involved in getting the false bill of sale notarized in Alabama and in changing the number of the car at some unknown time, but presumably before the bill of sale was notarized on March 16. *Supra*, pp. 5–6. And then, in Tennessee, there were further acts of concealment in the painting of the car. *Supra*, p. 6. Furthermore, the trial court submitted the case to the jury on the basis that the indictment charged separate acts of receiving and concealing "through the changing of license plates and painting of the car, among other things." *Supra*, p. 7.

The trial record thus completely refutes the premise of petitioner's argument that only one act and one transaction was involved. The acts of concealment were not merely coextensive with the transportation, but were both prior and subsequent to that transportation and distinct from it.

C. *Even if the trial record is not considered by the Court, this case cannot be decided on the assumption that there was only one act.*

If the trial record is not deemed properly before the Court at this time, the case must nevertheless be decided on the basis (which the trial record merely makes explicit) that the acts of concealment and of transportation were separate. There is nothing on the face of the indictment, except that the events are alleged to have occurred "on or about" the same date, to indicate that the two acts charged were parts of *one* act or transaction. It was therefore necessary for petitioner, in collaterally attacking the judgment, to present the factual foundation for his attack. This he has not done. See *In re Cuddy,* 131 U. S. 280, discussed, *supra,* p. 21. See also *Ex parte Hull,* 312 U. S. 546, where the petitioner claimed, as to a second conviction, a denial of due process by reason of variance between pleading and proof; in addition to discussing the merits, the Court specifically noted at p. 551: "Furthermore, ascertainment of these facts is impossible since petitioner has not furnished the transcript taken at the second trial. Accordingly, it would be improper to inquire whether petitioner was denied procedural due process in the second trial." In the absence of contrary proof, by a trial record or by agree-

ment of counsel, it would have to be presumed that the two counts of the indictment, which clearly *could* cover separate acts, actually did so. It is established that where an indictment on its face purports to charge a federal offense, it cannot be challenged after conviction, unless it appears from the indictment's face that no offense could possibly have been committed. *Goto* v. *Lane,* 265 U. S. 393; see also *Knewel* v. *Egan,* 268 U. S. 442. By a parity of reasoning, it cannot be assumed on collateral attack that two counts of an indictment which do not on their face necessarily relate to one act or transaction nevertheless do so.[8]

II. THE TRANSPORTER OF A STOLEN MOTOR VEHICLE MAY BE SEPARATELY PUNISHED FOR ACTS OF CONCEALMENT WHICH ARE SEPARATE FROM AND IN ADDITION TO THE TRANSPORTATION

We have shown in Point I that, either from the face of the indictment or on consideration of the trial record, this case should be decided on the basis that the acts of concealment of which petitioner was found guilty were in addition to, and not merely a part of, the transportation. In our view, the only issue which this case properly presents, therefore, is whether the transporter of a stolen motor vehicle may be subject to separate punishment for such separate acts. There is no reason in principle, or in the language or legislative history of the statute, why he should not be.

[8] Unlike *Bell* v. *United States,* 349 U. S. 81 (see footnote 6, *supra,* p. 18), the government cannot (of course) concede here that only one act or transaction was involved.

A. *The rule of lenity does not make one offense out of separate acts motivated by separate criminal impulses.*

The decision of this Court in *Ladner* v. *United States,* No. 2, this Term, decided December 15, 1958, makes clear that it is of significance to the problem of determining whether consecutive sentences may be imposed for related acts to consider whether the offense involved one transaction or more than one. The Court there, faced with the problem of whether consecutive sentences could be imposed under former 18 U.S.C. 254 (present 18 U.S.C. 111) for assault on two federal officers while resisting arrest, sent the case back for a hearing to determine whether the wounding of two federal officers was the result of one shot or more, holding that the firing of one shot could constitute only one offense, even if two officers were wounded. The problem of statutory construction was regarded as involving different considerations if the case showed one criminal impulse or more than one.

The importance of this consideration was foreshadowed by other recent decisions, although not there emphasized because the facts were not in dispute in those cases. In *Bell* v. *United States,* 349 U.S. 81, 83–84, in explaining the rule of lenity, the Court said, "if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction

into multiple offenses". The rule of lenity is thus limited to the situation where the offenses involve a single transaction; it is a rule "against turning a single transaction into multiple offenses" where the Congressional intent is not clear. Inevitably, this makes it of concern to the Court whether the transaction before it is single or multiple. Nothing in the *Bell* opinion casts the slightest doubt on the proposition that the transportation of one woman is a crime under the Mann Act. Nor is there anything to suggest that the transportation of two women at two different times would not be two offenses under that statute. Similarly, the decision in *Prince* v. *United States,* 352 U.S. 322, that entry into a bank with intent to rob and the completed robbery after entry were not separably punishable does not mean that entry into a bank is not made punishable. It is only in the factual pattern where the entry and the robbery are part of one act or transaction that the Court found that Congress did not intend to impose multiple punishment. And in *Gore* v. *United States,* 357 U.S. 386, where the majority held that Congress intended to authorize separate punishment under different statutes, even though deriving from one transaction, none of the opinions, majority or dissenting, implies that the two separate sales there proved would not constitute two separate offenses even under one statute. In *United States* v. *Universal C.I.T. Corp.,* 344 U.S. 218, 224–225, the Court distinguished between a course of conduct motivated by a single impulse and a "wholly distinct managerial decision" as to another possible violation. See also *Hoag* v. *New*

Jersey, 356 U. S. 464, and *Ciucci* v. *Illinois*, 356 U. S. 571, where the Court held that the states could properly treat offenses against different persons occurring at the same time as separate offenses.

We think this principle largely disposes of the problem of this case. If two separate sales motivated by two separate impulses can be two offenses under the same statute, we see no reason why separate acts of transportation and concealment occurring at different times are not separate offenses under two different sections of the Dyer Act. See also the government's brief in *Heflin* v. *United States*, No. 137, this Term, at pp. 19–24.

B. *There is nothing in the language or legislative history of the statute which indicates that Congress did not intend the tranporter to be separately punished for separate acts of transportation and of concealment.*

1. The two sections here involved (Sections 3 and 4 of the National Motor Vehicle Theft Act, 41 Stat. 324 (now 18 U. S. C. 2312 and 2313) *supra*, p. 2) concededly make provision for two separate offenses. Section 2312 punishes anyone who transports in interstate commerce a stolen motor vehicle, knowing it to have been stolen; Section 2313 punishes anyone who "receives, conceals, stores, barters, sells, or disposes of" a stolen vehicle moving as part of interstate commerce, knowing it to have been stolen.

Of the various acts specified by Section 2313, only "receives" would almost always necessarily be involved in the transportation itself. "Conceal," "barter" or "store" could occur before, during, or

after a particular interstate transportation even though the car was still in interstate commerce. "Sell" and "dispose of" would usually occur after some interstate transportation in order to be federally punishable. It is thus evident from the face of the statute that Congress had in mind the punishment of acts which were separate from, and in addition to, the interstate transportation, and which would normally require a criminal impulse separate and different from the act of transporting.

It cannot be contended, as petitioner urges, that the transportation of a stolen automobile in interstate commerce and its concealment or disposal must necessarily merge. An accused who merely transports a stolen automobile interstate is not guilty of the same degree of criminality as one who, in addition to the illegal transportation, conceals the automobile so that its ultimate return to the true owner becomes more unlikely. As this case illustrates, acts of concealment can involve such affirmative separate acts of wrongdoing as changing motor numbers, executing false bills of sale, repainting, and major repairs. Those affirmative additional acts are in themselves offenses under Section 2313,* and are properly subject to additional punishment. The term "whoever" which introduces Section 2313, *supra*, p. 2, is of broadest possible coverage. It includes the person who does the transporting if, in addition to transporting, he com-

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* *Donaldson* v. *United States*, 82 F. 2d 680 (C. A. 7); *United States* v. *Di Carlo*, 64 F. 2d 15 (C. A. 2); *United States* v. *Guido*, 200 F. 2d 105 (C. A. 2); *Phillips* v. *United States*, 206 F. 2d 923 (C. A. 10).

mits any of the several acts which Section 2313 punishes. Indeed, if Congress had intended Section 2313 to apply only to someone other than the transporter—*i. e.*, a confederate or "fence"—it would have been easy enough to provide for punishment of one who conceals, barters, sells, etc., a stolen motor vehicle "received from" a person who transported it in interstate commerce. The language which Congress used shows that it intended to punish anyone who separately does the affirmative acts which Section 2313 prohibits, whether he is the transporter or someone else.

Moreover, a person who violates Section 2312 does not necessarily have the intent to violate Section 2313. Because of the limitations of federal jurisdiction, the violator of Section 2312, the transporter, may or may not be the thief. He could be merely a person hired to transport the car after the theft, with no interest in the car before or after any one transportation. It thus would be particularly incongruous to hold that a person who does acts in addition to transporting—acts designed in a further way to keep the car from its original owner—was not intended to be separately punishable for those additional acts.

2. The legislative history suggests that, while Congress undoubtedly intended that third person confederates receiving and concealing stolen automobiles after interstate transportation would be held liable under Section 4 of the Dyer Act, it also intended to impose a cumulative penalty upon a person, such as the petitioner here, who commits both the offenses proscribed in Section 3 and Section 4.

The report of the House Committee on the Judiciary, H. Rep. No. 312, accompanying H. R. 9203, 66th Cong., 1st Sess., p. 1, stated that the purpose of the bill was for:

> * * * the providing of severe punishment of those guilty of the stealing of automobiles in interstate or foreign commerce. There has been and is now a most widespread demand for such a law. State laws upon the subject have been inadequate to meet the evil. Thieves steal automobiles and take them from one State to another and ofttimes have associates in this crime who receive and sell the stolen machines. The losses to the people of the United States by reason of this stealing amounts to hundreds of thousands of dollars every year. It is getting worse. It is getting so now that it is difficult for the owners of the cheaper cars to obtain theft insurance, due to the great loss that insurance companies have sustained. During the past year automobile theft insurance on this class of cars has increased 100 percent. It is automobiles of that price that are generally stolen. Automobile thieves who make a specialty of this crime do not steal many of the higher priced cars, the reason being of course that they are not so easily sold. * * *

In the House debate, Congressman Dyer, the sponsor, announced that the purpose of the legislation was to suppress crime in interstate commerce, and continued (58 Cong. Rec. 5472):

> * * * Automobiles admittedly are tangible property, capable of being transmitted in interstate commerce. The larceny of automobiles is made a crime under the laws of all the States

> in the Union. No good reason exists why Congress, invested with the power to regulate commerce among the several States, should not provide that such commerce should not be polluted by the carrying of stolen property from one State to another. Congress is the only power competent to legislate upon this evil, and the purpose of this bill is to crush it with the penalties attached.
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> * * * * *
>
> [The bill] provides, gentlemen, for only two things. Section 3 provides for the punishment of a thief stealing a car and transporting it from one State to another. Section 4 provides for the receipt of the stolen car by thieves in another State for the purpose of selling and disposing of it.

In the debate in the Senate, Senator Cummins spoke of the two separate sections of the Act here involved in the following words (58 Cong. Rec. 6434):

> * * * The practice is to steal an automobile close to a State line and run it across the State line. The first section [§ 3]is intended to punish anyone who does that thing, knowing the vehicle to have been stolen. The further practice is, if possible, *to dispose of the vehicle to some other party, confederate or otherwise, when it gets across the State line, and section 4 is for the purpose of punishing a man who barters or sells or disposes of the property with intent to deprive the owner of the possession thereof, or if he conceals it knowing it to have been stolen.* * * * [Emphasis added.]

When he spoke of the further practice to dispose of the vehicle to some other person, confederate or other-

wise, Senator Cummins must have had the transporter in mind. His statement indicates that, in committing such additional acts, the transporter would be guilty of an offense under Section 4 (now 18 U. S. C. 2313).

Congress intended not lenity, but severe sentences, for double violators of Section 3 and 4, so that there would be an effective deterrent to the criminal practices which Congress sought to eliminate. The transporter who "conceals, stores, barters, sells, or disposes of" the vehicle performs the same proscribed acts as another who does likewise, except that the transporter is guilty of the additional crime proscribed in Section 4. As illustrative, see *United States* v. *Hampden,* 294 Fed. 345 (E. D. Mich.), denying a petition for modification of sentences against a single accused for violation of both Sections 3 and 4. The court said (294 Fed. at 348):

> * * * It certainly cannot be said in the present case that the concealing or storing of the stolen automobile in Detroit was necessarily an incident of its transportation to Detroit. Such transportation ended on arrival at its destination. The concealment and storage occurred after such arrival. Petitioner, in fact, concedes that in the systematic stealing of automobiles, which the Dyer Act was designed to reach, one party usually does the stealing, and another party at the end of the line receives and stores and sells the stolen transported automobile, and that it was the purpose of this statute to make each of these acts a crime, and thereby to punish each offender concerned therein. *The fact, however, that each of these acts, which Congress has thus defined as a separate legal offense, has*

> *been committed by the same person, instead of by several persons, cannot render them any the less separate offenses,* and, the jury having found that petitioner committed each of the forbidden acts, he was properly convicted and sentenced for each of the crimes created by Congress and charged in the indictment. [Emphasis added.]

It is significant, moreover, that the 79th Congress, which amended the original Act to include stolen aircraft (59 Stat. 536), interpreted Sections 3 and 4 as proscribing separate and distinct crimes without reference to whether one or more persons were involved in the transaction. Both S. Rep. No. 40, p. 1, and H. Rep. No. 866, p. 1, 79th Cong., 1st Sess., stated as follows:

> The National Motor Vehicle Theft Act, enacted October 29, 1919, makes it a crime to transport or cause to be transported in interstate commerce a motor vehicle knowing the same to have been stolen. It is also a crime to receive, conceal, store, barter, sell or dispose of such a motor vehicle knowing that it has been stolen. Maximum penalties under the act are fixed at $5,000 fine, or 5 years' imprisonment, or both.

3. The numerous lower federal court decisions, to which the court below adhered (R. 49–50), have consistently taken the position that the two sections provide separate offenses for transporting a stolen automobile and for receiving and concealing it, so that cumulative sentences may be imposed. *York* v. *United States,* 299 Fed. 778 (C. A. 6); *Chrysler* v. *Zerbst,* 81 F. 2d 975 (C. A. 10); *Doll* v. *Johnston,* 95

F. 2d 838 (C. A. 9), certiorari denied, 304 U. S. 574; *Jackson* v. *Hudspeth*, 111 F. 2d 128 (C. A. 10); *Record* v. *Hudspeth*, 126 F. 2d 215 (C. A. 10), certiorari denied, 316 U. S. 703; *Lindsay* v. *United States*, 134 F. 2d 960 (C. A. 10), certiorari denied, 319 U. S. 763; *Batson* v. *Squier*, 146 F. 2d 264 (C. A. 9), certiorari denied, 324 U. S. 874; *Madsen* v. *United States*, 165 F. 2d 507, 510 (C. A. 10); *Crawford* v. *United States*, 214 F. 2d 313 (C. A. 6); *Austin* v. *United States*, 224 F. 2d 273 (C. A. 6); *United States* v. *Hampden*, 294 Fed. 345 (E. D. Mich.); *United States* v. *Runion*, 47 F. Supp. 594 (E. D. Ky.); *United States* v. *Spradley*, 65 F. Supp. 136 (W. D. Ky.), affirmed, 162 F. 2d 203 (C. A. 6). These cases (except *York*) arose on collateral attack and for the most part the courts found it unnecessary to determine whether in fact the offenses were part of one act of transportation as the defendant normally alleged. They pointed out that, even on that assumption, each section required proof of acts which the other did not and that under the decisions of this Court [10] this in itself made the offenses distinct. For example, in *Chrysler* v. *Zerbst, supra*, the court said (81 F. 2d at 976):

> * * * each count of the indictment charged a separate and distinct offense. The offense charged in count one involved the element of

[10] *E. g., Lindsay* v. *United States*, 134 F. 2d at p. 961, fn. 1, cites *Blockburger* v. *United States*, 284 U. S. 299 (two offenses from one sale of narcotics); *Burton* v. *United States*, 202 U. S. 344 (unlawfully receiving compensation and agreeing to receive it); *Morgan* v. *Devine*, 237 U. S. 632 (forcibly entering a post-office to commit larceny and larceny); *Gavieres* v. *United States*, 220 U. S. 338 (disorderly conduct and insulting a police official).

> transportation in interstate or foreign commerce, and receiving and concealing the motor vehicle was not an element thereof. The offense charged in count two involved the elements of receiving and concealing the motor vehicle and transportation thereof in interstate commerce by the defendants, was not an element of that offense.

And in *Lindsay* v. *United States, supra,* the separability of the two statutory offenses is recognized in this language (134 F. 2d at 960–961):

> Congress may prohibit and make punishable as a separate and distinct offense each separate and distinct act or step of a single transaction which embraces an element which the others do not.
>
> * * * * *
>
> While the offenses charged in count two may have been directly related to the transportation of the automobile from Portales to Tulsa and a continuation of that transaction, each required proof of a fact not required to establish the charge in count one, namely, receiving, concealing, and storing the automobile. It follows that the offenses charged in count two were separate and distinct from the offense charged in count one.

The *Lindsay* decision pointed out the transporter could conceal the automobile during transportation (134 F. 2d at p. 962) and since, by his plea of guilty, the defendant there admitted that he did conceal it, the court upheld the consecutive sentences on both counts.

In sum, Section 2313 proscribes acts which, except for receipt, must necessarily be in addition to the interstate transportation proscribed by Section 2312, even if they are committed as a very part of that interstate transportation. There is reason to believe that Congress intended such separate acts to be separately punishable whether or not they occurred at the time, and as a part, of the transportation. But certainly there is no reason to hold, as it would be necessary to hold in this case to sustain petitioner's position, that acts of concealment, which are clearly distinct from and in addition to the transportation are not subject to separate punishment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment denying petitioner's motion to vacate sentence should be affirmed.

Respectfully submitted.

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